BLACK HILLS FOREST RESOURCE ASSOCIATION

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NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515

To Whom It May Concern:

The Black Hills Forest Resource Association (BHFRA) is a trade organization of forest products companies in the Black Hills region of South Dakota and Wyoming. Our members are daily affected by the manner in which NEPA has come to be applied and interpreted by federal land management and regulatory agencies. Principally, our experience and concern with the NEPA process pertains to the USDA Forest Service and the Black Hills National Forest, from which our membership must procure approximately seventy percent of its overall supply of raw material in order to remain viable businesses. The BHFRA and its individual member companies participate vigorously in the NEPA process, both through opportunities for public comment on agency decisions and as interveners in NEPA-related federal court actions.

We commend the Task Force for its time and attention to improving and updating NEPA, and hope our comments on the draft report will help improve and refine the Task Force's findings and recommendations.

We have reviewed and assisted in the development of comments formulated by the American Forest and Paper Association. AF&PA possesses considerable legal and practical expertise in the application and interpretation of NEPA. Therefore, we lend our full support to AF&PA's recommendations.

However, the Task Force's draft report raised issues bearing further scrutiny and discussion, which we will highlight here as a supplement to our endorsement of AF&PA's comments.

<u>Litigation - The Facts, Figures and Effects</u>
The Task Force's discussion of NEPA related litigation lends too much credence to the assertion that only a small fraction of the total number of EISs in a given year resulted in litigation. The real issue is that, while NEPA is a procedural statue, activist groups are using the law to assert veto authority over the environmental and land management policies of the United States government. Tens of thousands of EISs are completed each year by agencies with non-controversial missions or pertaining to non-controversial

subject matter. However, when the statistics are broken-down to the level of particular agencies, the numbers tell a wholly different story about NEPA litigation.

The USDA Forest Service, for instance, was the subject of a study by the SUNY College of Environmental Science and Forestry (Malmsheimer, et al 2004) which found that NEPA was the most common grounds used by litigants to challenge EA and EIS decisions. Of the approximately 600 court cases filed against the Forest Service between 1989 and 2002, NEPA was among the statutory bases in well over 400 of them (67%). The second most frequent grounds for litigation was the National Forest Management Act, at a distant 275 cases. Clearly, NEPA is the most frequently used statute in litigating Forest Service decisions, and the implications of these decisions are transferred upon nearly every other agency responsible for complying with NEPA.

The total number of EA and EIS decisions successfully completed by the Forest Service without litigation during the period of time in this study is wholly irrelevant when one considers the implications for all federal agencies resulting from over 400 different US court opinions reviewing and reinterpreting the meaning of the statute. The Forest Service has clearly been the subject of a concerted campaign to gerrymander the requirements of NEPA so as to render decision-making prohibitively difficult.

We therefore encourage the Task Force to better acknowledge the role of NEPA litigation as the genesis of "analysis paralysis" for many agencies, including the Forest Service. On this basis, the Task Force should commit itself to statutorily clarifying the requirements for NEPA compliance and asserting an unambiguous statement of environmental policy, in order to contain litigious special interest groups' ability to rewrite the meaning of the law as they see fit.

<u>Public Participation</u>

The Task Force report's discussion of this topic glosses over an important perspective shared by many members of the public, including constituents and associates of BHFRA: The modern-day incarnation of NEPA's analytical and disclosure requirements has discouraged public participation in a manner far more significant than any of the Task Force's proposed improvements to the statute or its regulations. Feigned trepidation regarding "eliminating public participation" on the part of groups advocating against changes to NEPA fails to overcome the reality that the work of these same organizations through administrative and legal means toward expanding the scope and requirements of standard NEPA analyses has resulted in NEPA documents more complex and voluminous than average members of "the public" have time or inclination to indulge.

Furthermore, the rare 'average citizen' diligent enough to navigate the labyrinth of a typical NEPA document is doubly confounded in attempting to formulate comments which will be successful in receiving serious consideration from the agency. Agencies such as the Forest Service spend most of their time and resources responding to comments submitted by the paid staff of activist organizations, who typically possess some level of legal and/or regulatory experience and design their comments to further balloon the volume and detail of the analysis in question, in addition to calling into question the agency's compliance with the statute and regulation. Ordinary members of "the public" who simply want to express their view on issues important to them receive

little consideration and soon find themselves further disenfranchised with a process purportedly designed for their benefit.

NEPA has been so perverted from its original purpose of facilitating public oversight in federal government decision-making, that paid lobbyists and interest group staff are the only members of "the public" who can participate in a meaningful fashion. This state of affairs represents a grievous contravention of Congress' original intent with the enactment of NEPA: Special interest groups now exert the most consequential and percussive voices in the NEPA process, and have done so by systematically rendering the process unintelligible to the average person. We strongly recommend the Task Force acknowledge as much; do not concede the advocacy groups' position that changes to the statute are tantamount to "cutting out the public," when in fact, the opposite is true. Any steps the Task Force can take toward simplifying, modernizing, and abbreviating the requirements of NEPA will do nothing but enhance public participation in precisely the sense that Congress originally intended.

Recommendation 1.1

The redefinition of "major federal action" is secondary, but importantly related, to the more relevant issue of lending clarity to the concept of "significance." Perhaps more than any other aspect of the statute, the issues of "significance" and "potential significance" are responsible for swelling the depth and breadth of analysis required to complete an EA or EIS. Over time, the number of issues asserting themselves as "significant" in agency decision-making analyses has increased dramatically. Courts, in turn, have made the evidentiary burden required for agencies to prove non-significance or disprove significance continually more difficult. Where the professional judgment of well-trained agency specialists once sufficed, courts are increasingly stipulating the requirements for hard data collection and even the manner in which data are to be collected and interpreted.

The concept of "significance" itself, as worded in NEPA, carries the implication that agencies are to assume their proposed actions will detrimentally affect the environment. Courts routinely make this assumption, as well. This most often places agencies in the position of having to "disprove a negative," which is simply impossible. The consequence, over time, has been the aforementioned accumulation of "significant" issues the agency must analyze in detail or "non-significant" issues the agency must adequately document as being so. The logical conclusion of continually enlarging the number of issues requiring detailed analysis, and the level of detail required to meet the agency's burden, is that at some point all agencies will find themselves completely unable to comply with NEPA. Some would argue that certain agencies have reached such a point already.

Something must be done to arrest this inevitable procession toward futility. The Task Force has addressed statutory requirements on the length and timelines for completing NEPA documents in other recommendations, but we do not believe these are advisable means to moderate NEPA's complexity. The Task Force should instead devise and advocate a logical definition of "significance," perhaps codifying the sufficiency of agency professional expertise. Furthermore, the broad policy statements in §101 of

NEPA should be amended to expunge the presumption of guilt regarding adverse environmental effects under which agencies must labor in proposing major or minor federal actions.

Recommendation 3.1

We strongly support this recommendation in concept. However, we are concerned the term "political subdivision" could be too broadly construed. Our understanding is that entities such as Conservation Districts are intended to be permitted to participate as cooperating agencies under such a clause, which is an arrangement we support and have had direct experience with. The Task Force should bear in mind that our reading of "political subdivisions" would also include virtually any board or commission established under the auspices of County government, Mayors and City Councils and extensions thereof, etc., which may over time render the cooperating agency process intractable. We recommend some moderation of the term "political subdivision" to include only elected officials or their designees. This would allow local governments to involve entities such as Conservation Districts at their discretion.

Recommendation 5.1

We support the concept of limiting agencies' requirements to consider infeasible or uneconomical alternatives as a means of abbreviating analyses and conserving fiscal resources. Pertaining specifically to the Forest Service, however, this recommendation may not always be advantageous. Economic feasibility is most directly related to appropriated budgets, at least in the eyes of the agency. Under a scenario where agencies were required to evaluate economic feasibility, some environmentally or socially preferable alternatives involving a rigorous program of forest management, specifically in Forest Planning, could be excluded from consideration on the basis of arbitrary budget assumptions. This recommendation could also foster renewed controversy over issues like below-cost timber sales, which, of course, are below-cost because the Forest Service is compelled to spend forty percent of its budget on environmental planning.

Recommendation 5.2

As is expressed in AF&PA's comments, we support agencies being required to consider the effects of inaction, but do not support compelling an agency to select one alternative or another. The underlying roots of this recommendation pertain directly to the question of whether NEPA is a procedural or substantive statute, the former being its recognized purpose according to the Supreme Court. Lower courts, however, do not always seem to share this clear distinction in the law. The Task Force should therefore recommend that, once and for all, NEPA is amended in such a fashion that affirms the Supreme Court's findings and solidifies the procedural nature of the statute.

Thank you for your time and consideration of these comments.

Sincerely,

s // Aaron Everett

Forest Programs Manager